

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**



United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM F. BUCKLEY, JR.,

Plaintiff-Appellee,

v.

FRANKLIN H. LITTELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC

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Because of the fundamental nature of what plaintiff-appellee conceives to be the error in the opinion in defining the words "fellow traveler" and "fascist" as applied to him, the plaintiff-appellee respectfully requests a rehearing en banc. The petition only deals with that part of the Court's opinion relating to the accusations of "fellow traveler" and "fascism".

The Court erred, it is respectfully submitted, in substituting sources other than the book itself to determine the meaning or lack of meaning of the words "fascist" and "fellow traveler". These words may be considered ambiguous but in a publication in which a libel defendant gives explicit definitions, an accusation of "fascism" or "fellow traveler" surely means for libel purposes what the publisher says they mean. If, for instance, a publisher said

that all fascists are murderers and X is a fascist, he is charging X with murder, whatever the word "fascist" may mean in other contexts. In the present instance the appellant defined in detail the meaning of those words. In fact, the book *Wild Tongues* consists mostly of definitions of fascism and fellow traveling. Nevertheless the Court looked to sources other than the book, i.e. Buckley's testimony and a dictionary, to determine the meaning of fascism. Indeed, as we read it, in footnote 4 the Court treated scornfully, if not scathingly, our argument at pages 10-17 of our brief in this Court that the defamatory nature of appellant's accusations is shown by the book itself.

We must therefore take issue with the Court in relying on authorities other than the book to determine what these words mean as applied by appellant to appellee, with great respect.

Facts

That part of the case relating to fascism and fellow traveling rests in substantial part on the first three paragraphs from pages 50-51 of the book, and the first sentence of the fourth paragraph quoted in the Court's footnote 1.

We respectfully submit that the only possible inference to be drawn from this passage is that appellee is a fascist fellow traveler and, at least to a degree, the counterpart in contemporary American politics of Von Ribbentrop, a war criminal, in pre-war German politics. What else can possibly be his "function"?

POINT I

The Court Erred, It Is Respectfully Submitted, in Substituting Sources Other Than Appellee's Book in Determining the Meaning or Lack of Meaning of the Words "Fascist" and "Fellow Traveler".

The Court says on page 4608: "The test applied to determine whether a passage is libelous was rather what the overall effect would be upon the ordinary reader."

The Court continues on page 4608 to say that since that doctrine was elucidated, "the law of defamation has in effect been rewritten in the light of the constitutional imperatives."

In the District Court, the Judge showed that he took the historic rule for granted when he said at A177:

"But if a fellow was reading through this book, he is not going to just read those three or four paragraphs. He presumably reads the whole book or he reads other parts than these paragraphs . . .

The entire book is in evidence and I would like to say to counsel that I think that the only realistic way to approach it is to consider the book as a whole, or those portions which are relevant in defining what is meant by the terms in those two pages."

All parties acquiesced in these remarks by the District Judge. Appellee submitted a memorandum analyzing the book to show what the author meant by the terms used on pp. 50 and 51. In fact the analysis at pages 10-17 of his brief in this Court was largely a paraphrase of the memorandum then submitted as relating to the meaning for purposes of this case, of "fascist" and "fellow traveler".

We submit that the ruling by the Judge was correct.

Section 563, subdivision d of the Restatement of the Law of Torts, provides as follows:

"In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory, may be so explained or qualified by their context as to make such an interpretation unreasonable. So, too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of the defamatory imputation includes all parts of the communication which are ordinarily heard or read with it."

Section 563 was quoted with approval by the Court of Appeals in *Balabanoff v. Hearst Consolidated Publications, Inc.*, 294 N.Y. 351, 355 (1945), and constitutes, or historically has constituted, the law of New York. Cf. *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 474 (1955).

The Court apparently in footnote 3 condemns the District Judge in that he "did not approach the task of interpreting the debatable meaning of the alleged libels in the light of the imperatives of 'uninhibited, robust and wide-open' debate. *New York Times Co. v. Sullivan*, 376 U.S. 254-271 (1964) . . ." But, with great respect, we cannot see any inconsistency between the Restatement, the Judge and *Times*.

We are not aware, moreover, that the progeny of time have altered the rule. The only relevant case disclosed by our research is clear that the defamatory nature of a publication continues to be determined by what its readers understand. *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 13-14 (1970). In this case, the

Court determined the meaning of the word "blackmail" not by looking in the dictionary but by a description of the circumstances in which it was used. The Court demonstrated that the readers from the context necessarily understood it to mean that the plaintiff had used a certain asset to take an adamant position in a commercial negotiation and not as a threat to reveal discreditable information unless paid money. Hence it was not defamatory. The concurring opinion of Justice White, hypothesizing that a publication means what the "ordinary reader" would understand, is especially illuminating at pp. 21-22.

Here the appellant author says most explicitly what he means by fascist and fellow traveler. We submit that for purposes of determining the defamatory nature of what he said we should look to those definitions rather than to other sources, and that *Times* is in no way inconsistent, and, indeed, in so far as applied to date, supports this conclusion.

POINT II

By the Definitions Which Appellant Makes in the Book, "Fascist" and "Fellow Traveler", as Used in Wild Tongues, Are Unquestionably Defamatory.

Here we can do no better than to quote from the pages in our brief in this Court:

Page 3.

Whatever might be the legal effect of terms such as "fellow traveler" and "fascism" *per se*, or used in isolation, in this particular instance the issue was whether Buckley was defamed by being described as the "outstanding representative" of fascist fellow trav-

elers in accordance with the explicit definitions of those terms in the book, the purpose of which was declared by Littell to be a guide to political extremists, in the interest of clarifying polemical discussion and persuading Christians to avoid them. The question thus, by virtue of these definitions, becomes whether Buckley was fascinated by brute force and its misuse, functioned as a deceiver, followed the party line, lent an aura of respectability to simple thuggery, approved or condoned totalitarianism, sadism and violence, the burning of synagogues, the defacement of Jewish buildings, the "use of the knife" etc., these being among the characteristics of fascists and their fellow travelers, as described by the book.

Pages 10-17

(Full quotation of pages 10-20 is impossible within the 10 page limit so we quote only excerpts from pages 10-17.)

LITTELL'S DEFINITIONS OF "FELLOW TRAVELER" AND "FASCISM"

Two questions must be resolved concerning Littell's description of Buckley as a "fellow traveler" of "fascism". What is a "fellow traveler"? With what organizations does Buckley have a 'fellow traveler' relationship? . . . (brief, p. 10).

Again, the language at pp. 50-51 itself is clear and unambiguous. The fellow traveler is at the edges of a "totalitarian movement". He is "important to building up totalitarian parties". Then there is a very direct and specific reference to the "fellow traveler to the Communists or fascists". . . . The expression "totalitarian" thus, according to the book, applies to appellee. (brief, p. 12).

The references to "fascist" and "totalitarian" on pp. 50-51 are part of an endless, repetitive pattern throughout the book as we demonstrated at p. 14 of appellee's brief.

The totalitarians "have in fact drawn the knife against all who stand in the way of their drive for power" (p. 65). This idea is reiterated at pp. 75 ("reversion to the law of the knife"), 102 ("the rule of the knife"), 103 ("the rule of the knife"), 112 ("those who . . . use the knife"), and 125 ("revert to the old rule of the knife"). They are "flesh eaters" (pp. 43, 72), to be suppressed by violence to the extent necessary (p. 72; see also p. 119). Or again, nicely avoiding endless repetition, they are "well poisoners" (pp. 42, 85), or "grave diggers" (p. 85). (brief, p. 15).

The addiction of totalitarian and fascists to anti-Semitism is strongly stressed (pp. 9, 10, 72, 95, 96, 98, 99, 141, 142, 148, 155, 169, 172); "totalitarian groups engage in the bombing of synagogues, defacement of Jewish buildings and cemeteries, slander of Jewish community leaders and public officials. . . ." (p. 95). The John Birch Society, which is singled out as a prototype fascist organization at p. 2 ("prominent fascist-type conspirac[y]"), and is thereafter a major object of attention pp. 13, 14, 21, 35-6, 37, 40, 41, 42, 43, 44, 63, 64, 75, 82, 94, 100, 112, 114, 118, 130, 131, 148, 170), "shows striking parallels to the Nazi party" (p. 45). The Nazi theme is woven throughout the book (pp. 41, 56, 80, 98, 140, 144). Racism is also attributed to the fascists and totalitarians (pp. 10, 25, 56, 111), as is demagoguery (pp. 20, 36, 89, 100, 116, 117, 118, 119). (brief, pp. 15-16).

The fascists and totalitarians are accused of "political pornography" (pp. 66, 124), "irreverence, slander, lying, deceit, violence, conspiracy, schism" (p. 15), "betrayal of the people" (p. 42), use of "the deliberate smear" (p. 50), "disrespect for the dignity and integrity and liberty of the human person and . . . brutal mistreatment of the person or group of dissenting conscience" (p. 76), approval of

"brain-washing, mental and physical torture, and liquidation . . ." (p. 77), "praise of violence" and "delight in the use of brute force" (p. 82), "a new style of treason in our time" (p. 83), "espionage, subversion and conspiracy" (p. 83), "manipulation of mobs" (p. 84), destruction of reputations (p. 85), and "terrorization" (p. 85). They want to "loose the police or the stormtroopers upon protesting citizens" (p. 87); the concentration camp is "the symbol of the totalitarian system" (p. 87). "The cult of the renegades is cultivated" (p. 90). "Parades replace discussion, symbols (including slogans) replace reasoned discussion, street fighting and the rule of the knife mark the regression to the primitive short-cuts to consensus" (p. 103). (brief, pp. 15-16).

The screed continues with references to "mob action" (p. 104), "symbols of sadism and violence" (p. 108), "cross burnings and lynchings" (p. 108), "vulgar and vicious forms of sedition" (p. 108), "unpunished arson and murder" (p. 108), "mob demonstrations, mob violence, and the 'trial' of public figures in mob assembly" (p. 108), "attack on constitutional government" (p. 109), "total revolution" (p. 110), "death to human liberty" (p. 112), "lust for power" (p. 112), "subversion" (p. 112), "ideological warfare" (p. 112), "those who strike at the vitals of civilized life" (p. 113), "passionate hatred and malice" (p. 119), "envy" (p. 119), "poisonous and cancerous . . . fascist propaganda" (p. 122), "subversive politics" (p. 124), "political adventurers" (p. 124; see also p. 138), "witch doctors" (pp. 124 and 128), "secret terror" (p. 146), "fear and smear" (p. 170), and "half truths and lies" (p. 170). (brief, p. 16).

This litany of denunciation is interspersed with references to fellow travelers, in addition to the passage at pp. 50-51 which constitutes the basis of the instant litigation and the other passages (pp. 68, 115, 131, 133) referred

to herein. At p. 42, the reader is referred to "the well-poisoners in America, notably the John Birch Society and fellow travelers" (p. 42). P. 111 deals with "fellow travelers among the weak and uncertain", p. 122 with "persons under radical right discipline or else fellow traveling with them", p. 130 with "fellow-traveling" magazines or organizations" which "whirl in orbit about one of the totalitarian centers of disciplined action"; reference is made at p. 132 to a "renegade fellow traveler". (brief, pp. 16-17).

POINT 'II

The Court's Dismissal of Our Presentation of Appellant's Own Definitions Is Not Warranted, We Respectfully Submit.

In footnote 4 the Court condemns this argument, saying at footnote 4 (pp. 4612-4613):

"... [A]ppellee's brief assimilat[es] to the book's appellation of Buckley as a 'fellow traveler' all of the evils associated with the Nazis: 'totalitarianism, sadism and violence, the burning of synagogues, the defacement of Jewish buildings, the use of the knife' etc. Brief for Appellee at 3, 10-20. The facial absurdity of this construction is heightened by the fact that the book . . . considers both fascism and communism to be totalitarian. . . ." [The footnote continues by demonstrating that the book includes Communism as a threat to America.]

With respect we do not regard these remarks as disposing of our presentation in Point II. Whether or not a "facial absurdity", it simply is a fact, as we read it, that the book does assimilate to Buckley, not all, but many, if not most of the evils associated with the Nazis, in par-

ticular, the use of violence in political agitation. Neither the Court nor appellant has alleged any factual error in our presentation at pp. 10-17.

CONCLUSION

The Court should grant a rehearing en banc.

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